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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 STEVEN WATSON,) NO. EDCV 11-01123-MAN
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 MICHAEL J. ASTRUE,) AND ORDER
15 Commissioner of Social Security,)
16 Defendant.)
17

18 Plaintiff filed a Complaint on July 21, 2011, seeking review of the
19 denial of plaintiff's application for a period of disability, disability
20 insurance benefits ("DIB"), and supplemental security income ("SSI").
21 On August 18, 2011, the parties consented, pursuant to 28 U.S.C.
22 § 636(c), to proceed before the undersigned United States Magistrate
23 Judge. The parties filed a Joint Stipulation on April 24, 2012, in
24 which: plaintiff seeks an order reversing the Commissioner's decision
25 and awarding benefits or, alternatively, remanding for further
26 administrative proceedings; and the Commissioner requests that his
27 decision be affirmed or, alternatively, remanded for further
28 administrative proceedings.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2

3 On January 18, 2008, plaintiff filed an application for a period of

4 disability, DIB, and SSI. (Administrative Record ("A.R.") 10.)

5 Plaintiff, who was born on July 24, 1964 (A.R. 15),¹ claims to have been

6 disabled since June 1, 1993 (A.R. 10), due to epilepsy (A.R. 51).

7

8 After the Commissioner denied plaintiff's claim initially and upon

9 reconsideration (A.R. 10, 55-59, 61-65), plaintiff requested a hearing

10 (A.R. 66). On May 27, 2010, plaintiff, who was represented by Mark

11 Tunnell, an attorney, appeared and testified at a hearing before

12 Administrative Law Judge Michael J. Kopicki (the "ALJ"). (A.R. 10, 21-

13 50.) Vocational expert Howard Goldfarb also testified. (*Id.*) On June

14 16, 2010, the ALJ denied plaintiff's claim (A.R. 10-20), and the Appeals

15 Council subsequently denied plaintiff's request for review of the ALJ's

16 decision (A.R. 1-4). That decision is now at issue in this action.

17

18 **SUMMARY OF ADMINISTRATIVE DECISION**

19

20 The ALJ found that plaintiff met the insured status requirements of

21 the Social Security Act through June 30, 1993. (A.R. 12.) The ALJ also

22 found that plaintiff has not engaged in substantial gainful activity

23 since June 1, 1993, the alleged onset date. (*Id.*) The ALJ determined

24 that plaintiff has the severe impairment of "seizure disorder." (*Id.*)

25 The ALJ found, however, that plaintiff does not have an impairment or

26

27 ¹ On the alleged disability onset date, plaintiff was 28 years

28 old, which is defined as a younger individual. (A.R. 15.; *citing* 20 C.F.R. §§ 404.1563, 416.963.)

1 combination of impairments that meets or medically equals one of the
2 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20
3 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925,
4 416.926). (A.R. 13.)

5
6 After reviewing the record, the ALJ determined that plaintiff has
7 the residual functional capacity ("RFC") to perform medium work as
8 defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c). (A.R. 13.)
9 Specifically, the ALJ found that plaintiff:

10
11 can lift and/or carry 50 pounds occasionally and 25 pounds
12 frequently, stand and/or walk (with normal breaks) for a total
13 of six hours in an eight-hour workday, sit (with normal
14 breaks) for a total of six hours in an eight-hour workday,
15 cannot climb ladders, ropes, or scaffolds, must avoid work at
16 unprotected heights and moving/dangerous machinery, cannot
17 operate a motor vehicle as a function of job duties, and
18 cannot use power tools.

19
20 (*Id.*)

21
22 The ALJ concluded that plaintiff is able to perform his past
23 relevant work as a telephone solicitor.² (A.R. 15.) Additionally, based
24 on his RFC assessment and after having considered plaintiff's age,
25

26
27 ² The ALJ noted that the vocational expert found that plaintiff
28 has past relevant work as a stock clerk and telephone solicitor. (A.R. 15.)

1 education,³ work experience, and the testimony of the vocational expert,
2 the ALJ found that jobs exist in the national economy that plaintiff
3 could perform, including: "packer"; "clothing marker"; and "laborer."
4 (A.R. 15-16.) Accordingly, the ALJ concluded that plaintiff has not
5 been under a disability, as defined in the Social Security Act, from
6 June 1, 1993, through the date of his decision. (A.R. 16.)

7 8 STANDARD OF REVIEW 9

10 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
11 decision to determine whether it is free from legal error and supported
12 by substantial evidence in the record as a whole. Orn v. Astrue, 495
13 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
14 evidence as a reasonable mind might accept as adequate to support a
15 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
16 a mere scintilla but not necessarily a preponderance." Connett v.
17 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
18 record can constitute substantial evidence, only those 'reasonably drawn
19 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
20 1066 (9th Cir. 2006)(citation omitted).

21
22 Although this Court cannot substitute its discretion for that of
23 the Commissioner, the Court nonetheless must review the record as a
24 whole, "weighing both the evidence that supports and the evidence that
25 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
26 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also

27
28 ³ The ALJ found that plaintiff has at least a high school
education and is able to communicate in English. (A.R. 15.)

1 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
2 responsible for determining credibility, resolving conflicts in medical
3 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
4 1035, 1039 (9th Cir. 1995).

5
6 The Court will uphold the Commissioner's decision when the evidence
7 is susceptible to more than one rational interpretation. Burch v.
8 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
9 review only the reasons stated by the ALJ in his decision "and may not
10 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
11 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
12 the Commissioner's decision if it is based on harmless error, which
13 exists only when it is "clear from the record that an ALJ's error was
14 'inconsequential to the ultimate nondisability determination.'" Robbins
15 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.
16 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
17 at 679.

18 19 DISCUSSION

20
21 Plaintiff claims that the ALJ: (1) improperly evaluated
22 plaintiff's credibility; and (2) improperly determined that the
23 vocational expert's ("VE") testimony was consistent with the Dictionary
24 of Occupational Titles ("DOT"). (Joint Stipulation ("Joint Stip.") at
25 2-15.)

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1 **I. The ALJ Failed To Give Clear And Convincing Reasons For**
2 **Finding Plaintiff's Testimony To Be Not Credible.**

3
4 Once a disability claimant produces objective medical evidence of
5 an underlying impairment that is reasonably likely to be the source of
6 claimant's subjective symptom(s), all subjective testimony as to the
7 severity of the symptoms must be considered. Moisa v. Barnhart, 367
8 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
9 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(a), 416.929(a)
10 (explaining how pain and other symptoms are evaluated). "[U]nless an
11 ALJ makes a finding of malingering based on affirmative evidence
12 thereof, he or she may only find an applicant not credible by making
13 specific findings as to credibility and stating clear and convincing
14 reasons for each." Robbins, 466 F.3d at 883. The factors to be
15 considered in weighing a claimant's credibility include: (1) the
16 claimant's reputation for truthfulness; (2) inconsistencies either in
17 the claimant's testimony or between the claimant's testimony and her
18 conduct; (3) the claimant's daily activities; (4) the claimant's work
19 record; and (5) testimony from physicians and third parties concerning
20 the nature, severity, and effect of the symptoms of which the claimant
21 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
22 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

23
24 The ALJ found that plaintiff's "medically determinable impairments
25 could reasonably be expected to cause the alleged symptoms." (A.R. 13.)
26 Further, the ALJ cited no evidence of malingering by plaintiff.
27 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must
28 be clear and convincing.

1 The ALJ stated that plaintiff's "statements concerning the
2 intensity, persistence and limiting effects of [his] symptoms are not
3 credible to the extent they are inconsistent with [the ALJ's RFC]
4 assessment." (A.R. 13.) The ALJ's first ground for rejecting
5 plaintiff's testimony is that "[t]he objective medical findings
6 generally do not substantiate the extent of [plaintiff]'s allegations."
7 (*Id.*) The ALJ, however, found that plaintiff's medically determinable
8 impairments could be expected to cause the symptoms regarding which
9 plaintiff testified. (*Id.*) To the extent the ALJ was of the view that
10 the severity of plaintiff's claimed symptoms and/or pain could not be
11 believed, absent clinical or diagnostic proof establishing the severity
12 described in plaintiff's testimony, that view was improper. "'Excess
13 pain' is, by definition, pain that is unsupported by objective medical
14 findings." *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986). The
15 failure of the medical record to corroborate a claimant's subjective
16 symptom testimony fully is not, by itself, a legally sufficient basis
17 for rejecting such testimony. *Rollins v. Massanari*, 261 F.3d 853, 856
18 (9th Cir. 2001); *Bunnell*, 947 F.2d at 347 (nothing that "[i]f an
19 adjudicator could reject a claim of disability simply because a claimant
20 fails to produce evidence supporting the severity of the pain there
21 would be no reason for an adjudicator to consider anything other than
22 medical findings"). Thus, the ALJ's finding that the objective evidence
23 does not support the extent of plaintiff's symptom testimony does not,
24 in and of itself, constitute a clear and convincing reason for
25 discrediting plaintiff's testimony. See *Varney v. Secretary*, 846 F.2d
26 581, 584 (9th Cir. 1988); see also *Burch*, 400 F.3d at 681.

27
28 The ALJ also found plaintiff to be not credible: (1) because of his

1 description of his daily routine; (2) because he did not frequently
2 visit his doctor despite alleged side effects of medication; (3) based
3 on alleged inconsistencies between plaintiff's hearing testimony and his
4 prior written statements about his seizures; (4) because plaintiff
5 lacked medical compliance; and (5) based on "[t]he fact [plaintiff] is
6 looking for work[, which] tends to show that he believes he is capable
7 of working." (A.R. 14-15.)

8
9 First, while the ALJ may look at plaintiff's daily activities as a
10 basis for determining whether plaintiff can perform certain work, the
11 ALJ's decision fails to demonstrate how plaintiff's ability to complete
12 paperwork for his divorce, a food stamp application, and his Social
13 Security Administration disability application translates into the
14 ability to perform full-time work as a telephone solicitor or in any
15 other occupation. See Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th
16 Cir. 1990)(daily activities may not be relied upon to support an adverse
17 credibility decision where those activities do not affect the claimant's
18 ability to perform appropriate work activities on an ongoing and daily
19 basis); Smolen v. Chater, 80 F.3d 1273, 1283 n.7 (9th Cir. 1996)("The
20 Social Security Act does not require that claimants be utterly
21 incapacitated to be eligible for benefits, and many home activities may
22 not be easily transferable to a work environment where it might be
23 impossible to rest periodically or take medication."). Further, the ALJ
24 fails to show the relevance of plaintiff's daily activities to his
25 credibility determination, because the ALJ did not demonstrate any
26 inconsistency between plaintiff's daily activity level and claimed
27 limitations. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.
28 1998)("Only if the level of activity were inconsistent with Claimant's

1 claimed limitations would these activities have any bearing on
2 Claimant's credibility.").

3
4 Second, plaintiff's lack of frequent doctor visits, despite the
5 side effects of his medicine, does not constitute a clear and convincing
6 reason for rejecting plaintiff's credibility. Plaintiff testified that
7 his medication "pretty much controls [his] daytime seizures," but also
8 results in side effects, including: dry mouth, "uncontrollable,
9 constantly moving, like nervousness," and depression. (A.R. 31, 34.)
10 When asked by the ALJ whether plaintiff had reported the side effects to
11 doctors, plaintiff responded that he has not been able to do so, because
12 he is currently in the middle of finding another doctor. (A.R. 31-32.)
13 Plaintiff testified that he is on Medi-Cal and must find a specialist
14 who will take Medi-Cal payments, because he cannot go to a "regular"
15 doctor.⁴ (A.R. 25-26.) Further, plaintiff testified that he has seen
16 a counselor for treatment of his depression. (A.R. 34.) Accordingly,
17 the ALJ's second reason for discrediting plaintiff is unpersuasive,
18 because it failed to account properly for his testimony as a whole. See
19 Reddick, 157 F.3d at 722-723 (ALJ's credibility finding determined to be
20 erroneous, because ALJ did not fully account for all parts of the
21

22 ⁴ The Ninth Circuit has "proscribed the rejection of a
23 claimant's complaints for lack of treatment when the record establishes
24 that the claimant could not afford it." Regennitter v. Commissioner,
25 166 F.3d 1294, 1297 (9th Cir. 1999); see also Smolen, 80 F.3d at 1284;
26 Gamble v. Chater, 68 F.3d 319, 322 (9th Cir. 1995) ("[a]lthough progress
27 has been made in providing affordable medical care to the needy . . .
28 many Americans are without the means or opportunity to obtain necessary
medical care. Social Security disability and SSI benefits exist to give
financial assistance to disabled persons because they are without the
ability to sustain themselves. It flies in the face of the patent
purposes of the Social Security Act to deny benefits to someone because
he is too poor to obtain medical treatment that may help
him.")(citations omitted).

1 claimant's testimony).

2
3 Third, the ALJ rejected plaintiff's credibility based upon what the
4 ALJ characterized as inconsistencies in plaintiff's statements.
5 (A.R. 14.) The ALJ noted that "[plaintiff] testified that he had not
6 had a seizure since 2006 to 2007, which was not consistent with his
7 earlier seizure questionnaire." (*Id.*) At the hearing, the ALJ asked
8 plaintiff when his last seizure took place, and plaintiff responded that
9 he thought it was in 2006 or 2007. (A.R. 33.) In plaintiff's earlier
10 seizure questionnaire, question three asked him to "state the dates
11 (approximate) of [his] last four seizures." (A.R. 152.) Plaintiff
12 filled in each of the four blanks with a date in 2007, but he expressly
13 noted in the last two blanks that he was unsure of the specific dates.
14 (*Id.*) Thus, plaintiff's hearing testimony and his earlier questionnaire
15 responses are not inconsistent, and the ALJ's mischaracterization of the
16 record cannot support his adverse credibility finding. See Regennitter,
17 166 F.3d at 1297 ("inaccurate characterization of the evidence"
18 constitutes error).

19
20 Further, the ALJ's assertion that plaintiff was "unable to provide
21 a good seizure description" is not a compelling reason to reject
22 plaintiff's testimony as not credible. (A.R. 14.) In response to a
23 seizure questionnaire's question -- "How long do your seizures usually
24 last?" -- plaintiff responded that he was too "unconscious to know."
25 (A.R. 152.) Further, plaintiff testified that he is unaware when he is
26 having a seizure. (A.R. 30.) Plaintiff also testified that he knows a
27 seizure has occurred, after-the-fact, because his jaw is sore, he may
28 have bitten his tongue, and he "[has] to use the bathroom." (A.R. 29-

1 30.) The ALJ fails to explain what he means by "a good seizure
2 description," and he also fails to explain how plaintiff, who is
3 unconscious during seizures, reasonably could be expected to provide
4 such a description. Accordingly, this reason advanced by the ALJ for
5 finding that plaintiff lacks credibility is not clear and convincing.

6
7 Fourth, the ALJ's reliance on plaintiff's purported noncompliance
8 with his medication to support an adverse credibility finding is legally
9 insufficient under the circumstances of this case. The ALJ cites only
10 the medical record noting that, in a 2009 emergency room visit, a note
11 was made that plaintiff ran out of his medications one week earlier.
12 (A.R. 15.) This sole incident is plainly insufficient to support the
13 ALJ's conclusion that plaintiff "has not been fully medically
14 compliant." (*Id.*) Plaintiff's financial constraints and consequent
15 inability to buy prescribed medications are documented. In his February
16 2008 seizure questionnaire, plaintiff was asked how often he sees his
17 doctor, and plaintiff responded, "cannot afford prescription refill or
18 doctor's visits." (A.R. 153.) Further, plaintiff testified that "they
19 just kicked in the Medi-Cal, the approval" (A.R. 43.)
20 Accordingly, when plaintiff went to the emergency room in 2009, he was
21 not covered by Medi-Cal. The Riverside Community Hospital triage
22 assessment even notes that plaintiff is "awaiting hardship medication."
23 (A.R. 240.) While an unexplained failure to seek treatment may cast
24 doubt on a claimant's credibility, such an inference is unreasonable
25 where plaintiff is indigent. See Fair v. Bowen, 885 F.2d 597, 602 (9th
26 Cir. 1989); see also *supra* note 4.

27
28 Fifth, the ALJ discredits plaintiff's testimony, because plaintiff

1 has applied for jobs, and according to the ALJ, such efforts show that
2 plaintiff "believes he is capable of working." (A.R. 15.) This reason
3 for discrediting plaintiff is unconvincing. While it is true that
4 plaintiff expressed a desire to work and applied for jobs as a
5 telemarketer, plaintiff did not indicate that he was capable of
6 *sustained* work. The ALJ's final reason for discrediting plaintiff's
7 testimony is as unpersuasive as his prior reasons, and thus, it does not
8 support the adverse credibility determination.

9
10 For the aforementioned reasons, the ALJ failed to give clear and
11 convincing reasons for discrediting plaintiff's testimony. This error
12 requires reversal.

13
14 **II. Any Theoretical Problems With The ALJ's Step Five Finding**
15 **Are Immaterial So Long As His Step Four Finding Stands.**

16
17 Plaintiff does not contend that the ALJ's step four finding
18 regarding plaintiff's RFC -- *i.e.*, that plaintiff can return to his past
19 relevant work as telephone solicitor -- would be improper, assuming that
20 the ALJ did not commit any other errors. (See Joint Stip. at 8-9.) At
21 step four of the Social Security Administration's sequential evaluation
22 process, "we consider our assessment of your residual functional
23 capacity and your past relevant work. If you can still do your past
24 relevant work, we will find that you are not disabled." 20 C.F.R. §§
25 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The ALJ's step five finding
26 addresses an alternative finding. Any error committed by the ALJ at
27 step five is harmless and immaterial *if* the ALJ's step four finding
28 stands, because the step four finding is adequate, on its own, to

1 preclude an award of benefits.

2
3 However, for the reasons discussed above, remand is necessary due
4 to error committed by the ALJ in connection with his assessment of
5 plaintiff's credibility. Further proceedings could result in a
6 modification of the ALJ's RFC assessment and thus, require a revision of
7 the ALJ's step four finding. Accordingly, it would be appropriate, on
8 remand, for the ALJ to consider the inconsistency issue raised by
9 plaintiff regarding the step five finding. Specifically, on remand, the
10 ALJ should consider if the vocational expert's testimony regarding the
11 three occupations was consistent with the DOT. If not, the ALJ should
12 consider whether additional testimony from the vocational expert must be
13 adduced.

14 15 **III. Remand Is Required.**

16
17 The decision whether to remand for further proceedings or order an
18 immediate award of benefits is within the district court's discretion.
19 *Harman v. Apfel*, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
20 useful purpose would be served by further administrative proceedings, or
21 where the record has been fully developed, it is appropriate to exercise
22 this discretion to direct an immediate award of benefits. *Id.* at 1179
23 ("[T]he decision of whether to remand for further proceedings turns upon
24 the likely utility of such proceedings."). However, where there are
25 outstanding issues that must be resolved before a determination of
26 disability can be made, and it is not clear from the record that the ALJ
27 would be required to find the claimant disabled if all the evidence were
28 properly evaluated, remand is appropriate. *Id.* at 1179-81.

1 Remand is the appropriate remedy to allow the ALJ the opportunity
2 to remedy the above-mentioned deficiencies and errors. See *Dodrill v.*
3 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so that the
4 ALJ could articulate specific and appropriate findings, if any existed,
5 for rejecting the claimant's subjective pain testimony). As discussed
6 above, should further proceedings cause the ALJ to revisit his step four
7 finding that plaintiff can perform his past relevant work, the ALJ then
8 must determine whether the existing vocational expert's testimony is
9 adequate to allow for the step five determination to be made, and
10 whether any deficiencies in the vocational expert's testimony must be
11 corrected.

12
13 **CONCLUSION**
14

15 Accordingly, for the reasons stated above, IT IS ORDERED that the
16 decision of the Commissioner is REVERSED, and this case is REMANDED for
17 further proceedings consistent with this Memorandum Opinion and Order.

18
19 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
20 copies of this Memorandum Opinion and Order and the Judgment on counsel
21 for plaintiff and for defendant.

22
23 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
24

25 DATED: July 23, 2012

Margaret A. Nagle

26
27
28 MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE